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Redlich on the Case System

Frederick A. Wislizenus
St. Louis Bar Association

REDLICH ON THE "CASE SYSTEM."

The report of Dr. Redlich on the case method in American Law Schools is quite commonly viewed as endorsing the case book system. I think this true only in a qualified sense. The report requires study rather than mere reading before we can state with any precision the lessons we are to draw from it.

First a word as to the author's standpoint. His learning, his familiarity with Anglo-Saxon law and institutions, his judicial temperament are beyond cavil. But no one is beyond the influence of his surroundings. An author's standpoint, though he does his best to eliminate himself from his objective presentations, must always be weighed with allowance for his personality.

Dr. Redlich, an Austrian, best knows the system of legal education in Germany and Austria. There the juristic training—at least that preceding the practical work of "Assessor"—consists formally in lectures which are attended by a small percentage of the students. The preparations for the examinations, all held together at the end of the whole course, are hurriedly made by theretofore idle students under an unofficial crammer [See Report, p. 72]. With this method Dr. Redlich contrasts the case book system. The realization of this gives for us a distinct coloring to the praise he bestows on the last mentioned system.

Again, it is well to keep in mind that Dr. Redlich, in his investigations of two months in this country, was almost exclusively in touch with the advocates of that system. This was perfectly proper and natural. Almost all leaders in legal education in this country are as yet strong partisans for the case books as established by Langdell, or at least think of themselves as such. I do not think this partisan advocacy obscured the clearness of Dr. Redlich's vision, but courtesy to the strong men he met in friendly intercourse, as well as the contrast with his Austrian system of legal education, led him to devote much more space to practical results of the actual use of cases in studying law, than to the discussion of the pedagogic theory called the case system.

A broad-minded allopathic physician, versed in the history of medicine, may well be enthusiastic over the permanent advances in the healing art which we owe to homoeopathy. Should you ask such a physician whether he accepted Hahnemann's fundamental doc-

trine as to infinitesimals in administration of drugs, he would repudiate it emphatically but briefly, and go on at length to show how the theory, however erroneous in his opinion, had historically put an end to the horse-doses our great grandfathers had to swallow. As I read Dr. Redlich's report, his attitude toward the case book system is analogous to that of my supposed allopathic physician to Hahnemann.

The case book theory when first propounded was asserted to be the only scientific method of studying law. "It is claimed that the case method, first and alone, made possible the scientific study of the common law; that only through it can the study of law gain the character of a science, because in the case method we find the application of the inductive method to the study of law, and science can be built up only by induction." [Report, p. 54.] Even more, the system in its perfection requires that the discussions in class-room should be limited to the specific cases under investigation; generalizations from a number of cases are forbidden. It is for the student to work out these results for himself. [Report, p. 28.]

That the analogy of the inductive method in natural science presents no justification of the case method is demonstrated in a passage of what seems to me irresistible logic, beginning at the bottom of page 54 of the report and ending at the bottom of page 57 with the sentence "Not induction but empiricism is in my opinion the characteristic feature of this method of instruction."

In such comments on the Redlich report as I have seen I find no direct attack on the passage just referred to: at best only somewhat modestly proffered pleas of confession and avoidance.

Indeed, prior to the Redlich report it was evident that the justification of the case book system was shifting from its original anchorage. An able generation, enthusiastically following the originators of the system, have maintained it in full vigor, but have cast out an additional anchor upon which, though perhaps unconsciously to themselves, they now place [and properly] their main reliance.

Professor Keener, speaking for a committee, as quoted in the Report, at page 23, says: "that the system produces a lawyer more quickly than the text-book system, for the reason that in their opinion," (the committee's) "the powers of analysis, discrimination and judgment which have been acquired by the study of cases, by the student before graduation, must be acquired by the student of the text-book system after he has ceased to be a student and has become a practicing lawyer."

After emphasizing the importance of teaching the student "to think legally," Dr. Redlich continues (Report, page 24), "Brief reflection shows plainly that it is only a step from this to a completely changed conception of the compass of legal education as a whole; to the conception, namely, that the real compass of scientific instruction in law is not to impart the content of the law, not to teach the law, but rather to arouse, to strengthen, to carry to the highest possible pitch of perfection a specifically legal manner of thinking. This step, after the new method had reached its full development, was unhesitatingly taken by the foremost American teachers of law. In discussing this matter I have again and again encountered the very emphatic opinion that the really great accomplishment of the case system consists in the "training in characteristically legal thinking," and that therein also is to be seen the great practical significance of this new method. He adds (Report, p. 25), "It is true that the aim of imparting legal knowledge is not completely put aside. That would be absurd."

I suppose no one who has fairly considered the subject will deny that a training in legal thinking is an essential, if not the supreme aim in a Law School course. I think it also clear that the study of cases is so excellent a way toward the contemplated result that a failure to resort to it would be inexcusable.

But if, abandoning the original theory that the system is "scientific," we justify the use of cases solely on the ground that they develop legal thinking, we have given no reason why case books *only* should be resorted to in legal education. Provided ample time is devoted throughout the course to the study of cases toward the development of legal thinking, there is no objection, so far as the present point is concerned, to imparting the legal knowledge concededly essential in other ways.

It seems to me the necessities of the situation have proved too strong for the protagonists of the theoretical case book system. In current case books we find not only notes to cases, contrasting the rulings, but also copious extracts from philosophical and historical writers on law, as well as occasionally (horresco referens!) quotations from mere text-books. It is possible, also, to find a mere excerpt from some decision, stating a legal proposition abstractly, without giving the facts in the case. Even in the lecture room some information outside of cases seems indispensable. Dr. Redlich says (Report, p. 30), "In response to my repeated questions" (at Harvard), "as to how beginners secured that elementary knowledge of

law without which even the simplest case cannot be understood, I was always informed that this need was partly met by the broad introductory lectures, partly by references dictated by the professors" (i. e., requirement to read text-books or some equivalent).

It seems then, (and I think I am so far following Dr. Redlich), that the use of cases is highly desirable, accomplishing objects hardly to be reached in other ways; but that there are at least some things which are not realized (or at least very inadequately so) by use of that method exclusively.

Dr. Redlich points out defects inherent in the exclusive case system, thus indicating ground which it is necessary to cover in other ways. He says (Report, page 41), "It is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the form of instruction almost exclusively through analysis of separate cases. The result is that the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features. This is, in my opinion, however, just as important for the study of Anglo-American law as for the codified Continental system, and it is a task which should also be accomplished by the law courses in the universities." To this end he recommends (Report, page 41), a preparatory course "to make clear to the students at the very beginning certain fundamental facts and guide posts of the law which are removed from all casuistry and theoretical controversy. Only in this way will their future work rest upon a solid and scientifically grounded foundation." Dr. Redlich emphasizes two elements of this "Propaedeutik." First, concepts such as choses in action, etc., should be explained. "They should not, as usually occurs to-day, come to the students unsystematically and unscientifically, as scraps of knowledge more or less assimilated out of law dictionaries and indiscriminate reading of text-books." (Report, page 42.) Second, "The historical scaffolding of the English Common Law, as a general introduction to the analytical study of Anglo-American law is extremely desirable and of the greatest importance." (Report, page 42.)

"An introductory course of lectures upon the Institutes of the Common Law seems to me extremely desirable, in order that before the student enters upon the casuistic study of law—lasting several years and of necessity splitting the topic up into fragments—he may be given a general survey of legal organization, and may thus be made to see the system of law as a living whole, the product

of centuries of development. I go farther than this, however. It seems to me very advisable to add also at the end of the course lectures which shall furnish the American law student once more, before he steps out directly into practical legal life, a certain general summing up and survey of the law." •

It is true Dr. Redlich treats of his "Propaedeutik" as if it were one general course covering the whole domain of law. But here it seems to me he shrinks from following his views to their logical conclusions. It would be cruel to the case system to urge that each course of cases should have its introduction. I cannot conceive entering on cases in real property without quite elaborate explanation of the concept, seizin, nor do I think that any number of cases on mortgages would prove satisfactory without a preliminary outlook over the historic development of the original common law notion. Why this necessary introduction to cases in real property should be part of the general introductory course, possibly preceding the specific work in real property by a year, rather than be given immediately before entering on the cases, is not clear to me. Furthermore, Dr. Redlich evidently conceives the preliminary course as lectures in the European fashion. A good text-book, to be studied by the student before the lecture and after, seems much better. This hardly requires argument in America. Such text-books should furnish in condensed form the necessary historic background for the study, with adequate explanations of the technical term involved, and a bald outline of the topic, touching as little as possible on the specific issues to be thereafter discussed in the cases. As to Dr. Redlich's further recommendation that at the end of the course the student have a general summing up and survey of the law, the objection is that the three-year course scarcely allows time for this; and Dr. Redlich accordingly suggests the addition of a fourth obligatory year. For various reasons it does not seem likely that his aspirations in the last respect will be realized for some time, if ever. But it would seem worthy of discussion whether it would not be advantageous to limit the study of cases sufficiently to make room for this valuable final course as well as for the "Propaedeutik." Moreover, it would seem, in extension of this idea of a final summing up, that, after a course of cases on some of these "fragments" of the law, a resumé would be highly desirable. For instance, after going by cases through Evidence with its numerous exceptions of independent historical origin, a review, linking the rules by broad general considerations and logically marshalling them seems almost

indispensable. These generalizations would have no proper place in an introduction to the course.

Dr. Redlich heartily approves of copious use of cases as an empiric mode of instruction preceded by preparatory and followed by summing-up lectures.

Assuming a general agreement that the study of many cases is a necessary part of the law course, it seems proper to discuss the reasons for using them. This will furnish us a guide for proper use of the system. Accepting Dr. Redlich's views, I say nothing further as to the "scientific" basis of case law study. Apart from that theory

First. It is properly urged that a principle is more clearly presented to the mind by concrete illustrations than by abstract statements. But this is true in any applied science. The natural method is for the instructor to propound concrete cases of everyday occurrence to the students, and have them deduce the underlying principles. For example, in seeking to give students in a course on Agency an idea of Estoppel, it would never do to call for the book definition. Take familiar illustrations of cases in which the agent has acted outside of actual authority, and have the student determine the principal's liability. From a number of such cases the class hammers out the definition for itself. It is of course desirable that the illustrations should be reported cases to which the student can be referred. This method of instruction seems to me under no obligation to the case book system. It was in common use before case books were printed.

Second. There are a few cases in legal history settling important propositions, theretofore mooted, in opinions so forceful that they have met with general acceptance. When questions arise to-day as to the application of such a principle, that decision is the starting point for discussion. In such cases the student should derive his knowledge of the law from the original source rather than from a restatement by any one else. This is true under any system of legal instruction.

When cases are cited as concrete examples or as leading cases the primary object is to teach the law. But cases should also be cited where this object is subordinate to

Third. The purpose of giving the student "The specific training in that manner of legal thinking which is peculiar to and necessary for the practicing lawyer." (Report, page 25.) It is difficult to exaggerate the importance of this use of cases. A case book,

especially in the first year, it seems to me, is primarily a course in case analysis. The topic, Agency, Torts, or whatever it be, seems secondary. The student to be sure will acquire knowledge of substantive law; the analysis of the case will bring that in its train as surely as heat accompanies flame; but that knowledge, however welcome and inevitable, is only a by-product.

The student must imagine himself successively counsel of plaintiff and defendant, and be able to answer all the questions an intelligent layman would ask his lawyer. A suit sounds in contract: Could it have been brought in tort? What consideration governed counsel's action? Or, in another case, turning, say, on adverse possession, it is conceded that plaintiff is entitled to one-tenth, if anything. Figure out from the complicated facts how that interest is derived. Again, a long decision turns on the possibility of a reverter. A paragraph of the opinion deals with a rule against perpetuities. Trace back the logical connection of that sentence with the main question. Such questions the student must ask himself in preparing the case.

Until the students become proficient in this work, much time in class must be spent in what is preliminary to discussion of the real point involved in the case, and progress as to the substantive law will be slow, though greater facility in handling cases at later stages should be at least partial compensation.

What has just been said suggests a difficulty as to some topics, at least when beginners are involved, and when the case system exclusively is used. If the cases are thoroughly analyzed, it is probable the time the school can allow for the topic will not suffice for the presentation of the whole of it; on the other hand, if, as I am inclined to suspect is sometimes done, the analysis is slurred over, and the case treated as a peg whereon to hang a discussion of the legal principle involved, the best reason for using the case system is no longer operative.

When advocating, as I have, the direct study of a class of leading cases, I of course laid myself open to the suggestion that the whole case system might be justified by carrying this admission to its full logical conclusion. I think it would not be hard to make distinctions here; but it does not seem necessary. If the objections I have hitherto urged are met; if there are preliminary "Institutes" on the topic; if analysis of the cases is insisted on to such extent as the students may need at their stage of development at the time; if there is leisure to cover the subject adequately solely by the study

of appropriate cases, together with a subsequent hour or two for correlating the work, and obtaining a general picture of the law on the topic as a whole, I should heartily agree to such use of cases.

My impressions after reflecting on Dr. Redlich's thoughtful report may be given as follows:

1. A study of cases for "the specific training in that manner of legal thinking which is peculiar and necessary for the practicing lawyer" is of paramount importance in the Law School.

2. I accept Dr. Redlich's view that when the case system is used a preliminary course is essential, and a course summing up the whole eminently desirable.

3. Going beyond Dr. Redlich, I think his principles applicable to long, important courses; and probably useful in subordinate ones.

4. Under the foregoing limitations I am inclined to think the presentation of legal doctrines through cases desirable, so far as want of time does not interfere with the full development of the subject by this method, which appears to me slower than the text-book.

5. When for any reason a text-book is used for any topic it should be supplemented by study of cases.

I do not think that any theory as to method of legal education to-day commands general assent. Dr. Redlich has attacked the original theory of the case system at its base. Most of us are Opportunists, contenting ourselves with compromises which are probably illogical. However that may be, the case system in practice has wrought a revolution. We shall never again place our main reliance on lecture and text-book. We all study cases, and, regardless of theory, recognize that the efficiency of Law Schools has thereby been increased. To the men who introduced the system and to their successors who have defended it the profession owes a debt of gratitude.

FRED. WISLIZENUS.